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Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NOLICHUCKEY SAND COMPANY, INC., *Petitioner,*

v.

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nolichuckey Sand Company, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 606 F.2d 693 (6th Cir. 1979), is reproduced in Appendix A. The unreported judgment and accompanying memorandum opinion of the United States District Court for the Eastern District of Tennessee are reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1979. By order dated December 26, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including February 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 103(a) of the Federal Mine Safety and Health Act of 1977 (the "Act"), which authorizes warrantless inspections, is constitutional insofar as it applies to the sand and gravel industry even though that industry has no history of pervasive government regulation and there has been no showing that warrantless inspections of sand and gravel facilities are essential to effective enforcement of the Act.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 103(a) of the Federal Mine Safety and Health Act of 1977, 91 Stat. 1297, 30 U.S.C. § 813(a) (I Supp. 1979), provides as follows:

> "Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is

> compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary [of Labor] shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The Federal Mine Safety and Health Act of 1977 (the "Act") became effective on March 9, 1978. 30 U.S.C. § 801 *et seq.* (I Supp. 1979). Approximately one month thereafter, on April 11, 1978, Mr. Charles McDaniel, an inspector employed by the Mine Safety and Health Administration of the Department of Labor, went to the sand and gravel pit operated by the Nolichuckey Sand Company ("Nolichuckey" or the "company") and demanded access to that facility for the purpose of making a routine safety and health inspection. App. C, *infra,* p. 19a. Since Mr. McDaniel did not have a search warrant, Mr. Thomas Bewley, vice president of the company, declined to permit Mr. McDaniel to proceed with the inspection. *Ibid.* Mr. McDaniel returned to the Nolichuckey sand and gravel pit on April 12, 1978, again seeking to conduct a warrantless inspection of the facility. *Ibid.* Upon being refused admission, Mr. McDaniel issued a citation and departed. *Id.* at 20a.

The Secretary of Labor thereafter initiated the present action in the United States District Court for the Eastern District of Tennessee. The relief requested by the Secretary included a preliminary and permanent injunction, prohibiting the Nolichuckey Sand Company, and its agents and employees, from refusing to permit warrantless inspections of Nolichuckey's business premises. Nolichuckey responded by filing a motion to dismiss on the ground that Section 103(a) of the Act, 30 U.S.C. § 813(a), insofar as it authorizes the warrantless inspection of sand and gravel pits, "is in derogation of the Warrant Clause of the Fourth Amendment and is therefore unconstitutional and void." Motion To Dismiss, p. 1 (September 1, 1978).

On September 14, 1978, the district court entered an order deferring consideration of Nolichuckey's motion to dismiss and of the Secretary's motion for a preliminary injunction until the time of trial, which the court advanced to September 21, 1978. App. B., *infra,* p. 11a. The only witness at the trial was Mr. M. V. Turner, an employee of the Mine Safety and Health Administration and Mr. McDaniel's supervisor. App. A, *infra,* p. 1a. Mr. Turner, who was called by Nolichuckey as an adverse witness, confirmed that "[t]he sole purpose of the * * * attempted inspection" of Nolichuckey's "business premises was to check routinely for possible violations of the Federal Mine Safety and Health Act of 1977" and that "Mr. McDaniel had no knowledge of any specific violation thereof." App. B, p. 10a. Mr. Turner also testified that any violations of the Act by Nolichuckey could not have been concealed easily. Tr. of September 21, 1978, p. 7. Finally, counsel for the government conceded that if there were "close" regulation of the sand and gravel industry, that regulation would have to be found in the 1977 Act. *Id.* at 16.

On December 14, 1978, the district court issued a memorandum opinion and order granting the Secretary's request for a permanent injunction. App. B., pp. 9a-16a. After noting that the question before it was "not wholly free from doubt" (*id.* at 15a), the court concluded that the warrantless inspections authorized by Section 103(a) of the Federal Mine Safety and Health Act of 1977 fell within the exception to the warrant requirement described in *United States* v. *Biswell,* 406 U.S. 311 (1972), and *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970). The district court distinguished this Court's decision in

Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978), on the ground that this case, unlike *Barlow's,* involves "a statute relating to a single industry (mining), which industry has had a history of close federal supervision and regulation." App. B, p. 15a. The court also implied, despite the testimony of Mr. Turner, that a warrant requirement would interfere with enforcement of the Act.[1] *Id.* at 15a-16a.

In affirming the judgment of the district court, the court of appeals recognized that "[t]he sand and gravel industry does not have the long history of regulation referred to in *Colonnade* or the extensive licensing scheme which was present in both *Colonnade* and *Biswell.*" App. A, p. 5a. But, according to the court of appeals, the determinative factor in assessing the validity of statutory exceptions to the warrant requirement is the "reasonableness" of Congress' determination to dispense with a warrant. *Id.* at 3a. The court held that warrantless inspections of sand and gravel facilities should be permitted under this standard because (1) of "the enforcement needs in the mining industry"; (2) the Federal Mine Safety and Health Act, as previously construed by the court of appeals,[2] permits warrantless inspections of only the

[1] On November 15, 1978, Nolichuckey filed a motion for a preliminary injunction to halt further administrative proceedings in connection with the citation issued by Mr. McDaniel on April 12, 1978. See discussion at page 4 *supra*. The court dismissed this motion as moot on December 14, 1978, when it ruled in the Secretary's favor in the present action. Administrative proceedings on the citation, involving a possible fine of $655.00 for Nolichuckey's refusal to permit a warrantless inspection of its facility, are still pending.

[2] United States v. Consolidation Coal Co., 560 F.2d 214 (6th Cir. 1977), *vacated and remanded,* 436 U.S. 942, *judgment reinstated,* 579 F.2d 1011 (1978), *cert. denied,* 439 U.S. 1069 (1979).

"active workings" of mines; (3) the Act permits a representative of the operator of a facility to be present during routine inspections; and (4) an operator's refusal to permit a warrantless inspection does not lead to the summary imposition of sanctions. *Id.* at 7a. Finally, the court acknowledged that several district courts have held the warrantless inspection provision of the Act to be unconstitutional but concluded that the Third Circuit's decision in *Marshall* v. *Stoudt's Ferry Preparation Co.,* 602 F.2d 589 (1979), *cert. denied,* 48 U.S.L.W. 3431 (January 8, 1980), which had approved warrantless inspections under the Act, was a "better reasoned" decision. *Ibid.*

REASONS FOR GRANTING THE WRIT

This case raises an important constitutional issue as to which guidance by this Court is urgently needed. The decision in this case seriously undermines this Court's decision in *Marshall* v. *Barlow's, Inc., supra,* and cuts deeply into the protection against warrantless searches afforded by the Fourth Amendment. If this decision is permitted to stand, the "narrow exception" to the Warrant Clause recognized in *United States* v. *Biswell, supra,* and *Colonnade Catering Corp.* v. *United States, supra,* is likely to engulf the general rule confirmed in *Barlow's* prohibiting the warrantless inspection of commercial premises. Although the court of appeals attempted to distinguish the situation presented here from the situation confronting this Court in *Barlow's,* the grounds of distinction relied upon by the court cannot withstand analysis.

Review by this Court also is warranted because the decision here conflicts with the holdings of three district courts that have considered the constitutionality

of the warrantless inspection provision of the Federal Mine Safety and Health Act of 1977 as applied to sand and gravel facilities. Several other courts have concluded, as has the Sixth Circuit in this case, that warrantless inspections of such facilities are constitutional. Unless this Court intervenes to resolve this conflict, there is a likelihood of continuing litigation with respect to the issue presented here and disagreement as to the constitutional implications of warrantless searches of facilities like those operated by petitioner.

I.

The Decision in This Case Undermines the Decision in *Barlow's* and Threatens a Significant Erosion of the Fourth Amendment

The decision in this case cannot be reconciled with the view of the Fourth Amendment endorsed by this Court in *Marshall* v. *Barlow's, Inc., supra.* As this Court noted in *Barlow's,* "[t]he general warrant was a recurring point of contention in the Colonies" during the pre-revolutionary period, being regarded as particularly offensive "by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." 436 U.S. at 311 (footnotes omitted). Against this background, this Court confirmed in *Barlow's* that warrantless searches of commercial premises are presumptively invalid, and will not be permitted unless the government can point to some "recognized exception" to the warrant requirement. *Id.* at 313.

In the case of routine agency inspections, this Court has recognized an exception to the warrant requirement in only two instances. In *Colonnade Catering*

Corp. v. *United States, supra,* this Court ruled that liquor establishments, subject to government licensing and having a history of pervasive regulation predating adoption of the Fourth Amendment, could be inspected without a warrant. Shortly thereafter, this Court held in *United States* v. *Biswell, supra,* that firearms dealers, also subject to licensing requirements and to pervasive regulation, may not insist upon a warrant before submitting to inspections pursuant to the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* (1976).[3]

The exceptions to the warrant requirement recognized in *Colonnade* and *Biswell* rest upon an implied consent theory. As this Court explained in *Barlow's* (436 U.S. at 313):

> "Certain industries have such a history of government oversight that no reasonable expectation of privacy * * * could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type * * *.
>
> * * * The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. * * *"

Permitting the decision in this case to stand would seriously undermine the decision in *Barlow's* and produce substantial uncertainty concerning the standard to be applied in judging the constitutionality of warrantless searches. The sand and gravel industry

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[3] The holding in Frank v. Maryland, 359 U.S. 360 (1957), which permitted warrantless inspections pursuant to municipal fire, housing and health codes, was overruled in Camara v. Municipal Court, 387 U.S. 523 (1967).

was not subject to significant federal regulation until early 1978, when the Federal Mine Safety and Health Act became effective.[4] The family-owned Nolichuckey Sand Company had, at that time, been in operation for almost 29 years. To hold that the owners of such a facility have impliedly consented to warrantless inspections, or have no reasonable expectation of privacy with respect to their business premises, is to raise a palpable fiction to the level of constitutional doctrine and to ignore the rationale of the decision in *Barlow's*.

The court of appeals expressly acknowledged in this case that "[t]he sand and gravel industry does not have the long history of regulation referred to in *Colonnade* or the extensive licensing scheme which was present in both *Colonnade* and *Biswell*."[5] App.

[4] The Federal Metal and Nonmetallic Mine Safety Act of 1966, 80 Stat. 772, permitted limited federal regulation of health and safety conditions in the sand and gravel industry. But the health and safety standards authorized by that legislation were, for the most part, advisory rather than mandatory. Mandatory standards could be issued only with respect to conditions that "could reasonably be expected to cause death or serious physical harm." 80 Stat. 774. The court of appeals recognized in this case that such limited government oversight does not constitute pervasive regulation of the type described in *Barlow's*. App. A, p. 5a.

[5] The court of appeals thus disagreed with the district court's conclusion that warrantless inspections should be permitted here because this case, unlike *Barlow's*, involves "a statute relating to a single industry (mining), which industry has had a long history of close federal supervision and regulation." App. B, p. 15a. But while disavowing this conclusion, the court of appeals arrived at the same result by finding that Congress had acted "reasonably" in bringing "all mineral extraction businesses and operations under a single regulatory act." App. A, p. 5a. Even conceding the "reasonableness" of that action by Congress, it does not follow that warrantless inspections of sand and gravel facilities—which had not previously been subject to significant federal regulation—should now be permitted.

A, p. 5a. But rather than ending its inquiry at that point, the court went on to assess the "reasonableness" of Congress' decision in the Federal Mine Safety and Health Act to dispense with a warrant requirement. As the decision in this case makes all too clear, the use of a "reasonableness" standard—loosed from the mooring provided by *Barlow's*—virtually ensures that *any* warrantless inspection scheme that Congress may enact will be upheld. Indeed, permitting use of that standard would rob *Barlow's* of much of its precedential significance

The court of appeals' suggestion that warrantless searches of sand and gravel facilities are "reasonable" in light of "the enforcement needs in the mining industry" (App. A, p. 7a) does not distinguish this case from *Barlow's*. The Secretary argued in that case that warrantless inspections were "essential to the proper enforcement of OSHA because they afford[ed] the opportunity to inspect without prior notice and hence to preserve the advantages of surprise." 436 U.S. at 316. That purported justification was found to be insufficient in *Barlow's*, in part because of the procedures available to the Secretary to obtain, in appropriate circumstances, *ex parte* warrants. Those procedures are available to the Secretary here as well. Moreover, the court of appeals' reference to "enforcement needs" ignores the undisputed evidence before the district court of the difficulty of concealing violations of the Federal Mine Safety and Health Act. Tr. of September 21, 1978, p. 7.

The court of appeals' further suggestion that refusal to permit warrantless inspections does not lead, under the Act, to the "summary" imposition of sanctions (App. A, p. 7a) similarly fails to distinguish this case

from *Barlow's*. The Occupational Safety and Health Act did not provide for any immediate sanction for refusal to permit warrantless inspections; indeed, the regulations issued by the Secretary under that statute expressly contemplated that an injunction would be sought in the event of a refusal to permit an OSHA inspection. *See* 29 C.F.R. § 1903.4 (1977). Moreover, the court of appeals' suggestion overlooks the citation issued by the Secretary's representative in this case to penalize Nolichuckey for having refused to permit a warrantless inspection. *See* note 1 *supra*. And, once the Secretary has obtained a permanent injunction against a particular operator, refusal by the operator to permit warrantless inspections places the operator in contempt of court, and may lead to the imposition of sanctions.

The court of appeals also is in error in suggesting that this case can be distinguished from *Barlow's* because the Federal Mine Safety and Health Act permits the operator of the facility to be present during routine inspections. App. A, p. 7. Permitting the operator of the sand and gravel facility to accompany the Secretary's representatives during warrantless inspections does not diminish the privacy interests involved or make those interests less compelling. Moreover, contrary to the apparent understanding of the court of appeals, the Occupational Safety and Health Act also permitted the owner of a facility to be present during any inspections conducted pursuant to that statute. 29 U.S.C. § 657(e).

In sum, the principal vice of the present decision—apart from the threat that it poses to Fourth Amend-

ment rights[6]—is that it seriously undermines the decision in *Barlow's*. Both *Barlow's* and this case involve industries that have been subject to federal regulation for only the last few years, so that it hardly can be said that the owners of the affected facilities have no reasonable expectation of privacy or that they have "in effect consent[ed]" to warrantless inspections of their business premises. 436 U.S. at 313. The statutes involved in both cases confer broad inspection powers, leaving to inspectors in the field substantial discretion concerning the timing, frequency and extent of individual inspections. Both statutes are concerned with the health and safety of workers. Yet, the Sixth Circuit has held one inspection provision to be constitutional, while this Court has held that the other violates the Fourth Amendment.

In view of the conflict between the Sixth Circuit's decision in this case, and this Court's decision in *Barlow's*, review by this Court is warranted. A decision by this Court would provide much-needed direc-

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[6] An indication of the extent of this threat is provided by the injunction issued in this case. That injunction forever, without exception, and on pain of contempt prohibits Nolichuckey and its agents and employees from refusing to permit warrantless inspections under the Federal Mine Safety and Health Act—no matter how frequent or arbitrary those inspections may become. The injunction is not "based on a 'plan containing specific neutral criteria.'" Torres v. Puerto Rico, 99 S. Ct. 2425, 2431 (1979), quoting from Marshall v. Barlow's, Inc., *supra*. Neither does it contain any of those "safeguards * * * generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the officer in the field.'" Delaware v. Prouse, 99 S. Ct. 1391, 1396-97 (1979), quoting from Camara v. Municipal Court, *supra*. The injunction is, in short, "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." Lo-Ji Sales, Inc. v. New York, 99 S. Ct. 2319, 2324 (1979).

tion to Congress,[7] administrative agencies [8] and affected businesses of the scope of Congress' power to authorize warrantless searches of commercial premises.

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[7] Congress responded to this Court's decisions in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967)—which held, *inter alia*, that warrantless searches of commercial premises are presumptively invalid—by including a warrant requirement in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* (1976), despite its stated preference for a warrantless inspection scheme. *See, e.g.*, H. R. Rep. No. 91-1444, 91st Cong., 2d Sess. 55 (1970). But when Congress was considering the Federal Mine Safety and Health Act of 1977, this Court's most recent pronouncements on the constitutionality of warrantless administrative inspections were contained in *Colonnade* and *Biswell*, which apparently prompted Congress to conclude that expansive exemptions from the warrant requirement would be sustained. *See* S. Rep. No. 95-181, 95th Cong., 1st Sess. 27 (1977). Two months after the effective date of the Federal Mine Safety and Health Act, this Court announced its decision in *Barlow's*, invalidating warrantless inspections of commercial premises pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a) (1976).

In view of the decision in *Barlow's*, and of the subsequent inability of the lower courts to agree on the standard appropriately used in judging the constitutionality of warrantless administrative inspections (see discussion at pages 15-17, *infra*), Congress can be expected to have substantial difficulty in attempting to divine those circumstances in which it may authorize warrantless inspections.

[8] Following *Barlow's*, a number of federal agencies operating under statutes permitting warrantless inspections have announced that they will seek a warrant whenever entry is refused. For example, the Environmental Protection Agency has ordered that inspections under the Clean Air Act, Noise Control Act, Clean Water Act, Toxic Substances Control Act and Federal Insecticide, Fungicide, and Rodenticide Act not be attempted without a warrant whenever consent for the search cannot be obtained. *See* "Environmental Protection Agency Memorandum on the Impact of the Marshall v. Barlow's, Inc., Decision," 2 Chem. Reg. Rep. 756 (August 4, 1978).

II.

Review by This Court Also Is Needed To Resolve a Conflict Among the Lower Courts on the Issue Presented in This Case

District courts in three recent cases, *Valley Transit Mix, Inc.* v. *Marshall,* No. 79-391-B, consolidated with Nos. 79-393, 79-422 and 79-454 (D. N.M., decided June 15, 1979), *appeal pending,* No. 79-2034 (10th Cir.), *Marshall* v. *Douglas Dewey and Waukesha Lime & Stone Co.,* No. 79-C-114 (E.D. Wisc., decided March 29 and May 30, 1979), and *Marshall* v. *Halquist Stone Company, Inc.,* No. 78-C-463 (E.D. Wisc., decided September 15, 1978), have concluded that the warrantless inspection provision of the Federal Mine Safety and Health Act of 1977 is unconstitutional as applied to sand and gravel facilities.[9] Several other courts, including the Third Circuit, have agreed with the court of appeals in this case, rejecting challenges to the warrantless inspection provision of the Act.[10]

The conflict among the lower courts on the issue presented in this case stems from a fundamental disagreement concerning the standard appropriately used in judging the constitutionality of warrantless inspections of commercial premises. In *Valley Transit, Douglas Dewey* and *Halquist Stone,* the courts emphasized that warrantless inspections are permissible in only "relatively unique circumstances"—those character-

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[9] The opinions in these cases, which have not been reported, are reproduced in Appendices D, E and F.

[10] Marshall v. Stoudt's Ferry Preparation Co., *supra;* Marshall v. Cedar Lake Sand and Gravel Co., 1 M.S.H.C. 225 (E.D. Wisc., decided November 9, 1979); Marshall v. The Texoline Co., No. CA 4-78-49 (N.D. Tex., decided March 23, 1979), *appeal pending,* No. 79-2372 (5th Cir.); Marshall v. Wait, No. S-78-11 (E.D. Cal., decided May 1, 1978), *appeal pending,* No. 78-2345 (9th Cir.).

ized by a long history of pervasive government regulation. Warrantless inspections of sand and gravel facilities were disapproved under this standard since, as already noted, there was no significant federal regulation of the sand and gravel industry until 1978, when the Federal Mine Safety and Health Act was enacted. By contrast, the courts that have approved warrantless inspections of sand and gravel facilities have employed, as did the court of appeals in this case, an expansive "reasonableness" standard, which focuses on factors that may have influenced Congress in dispensing with a warrant requirement.

Review by this Court is urgently needed to resolve this conflict. Unlike the *Stoudt's Ferry* case, in which this Court recently denied certiorari, the question of the standard appropriately applied in assessing the constitutionality of warrantless searches of commercial premises is squarely presented here.[11] Resolution of

[11] One of the threshold issues in *Stoudt's Ferry* was whether the operations involved in that case were covered by the Federal Mine Safety and Health Act of 1977. Stoudt's Ferry contended that its operations were not subject to the Act because it was not engaged in the extraction of minerals from natural deposits. The government disputed that contention, and argued additionally that the Stoudt's Ferry plant was a coal preparation facility and thus was part of an industry—coal mining—that had a long history of pervasive government regulation. *See, e.g.*, United States v. Consolidation Coal Co., *supra*; Marshall v. Sink, No. 77-2614 (4th Cir., decided January 24, 1980) (holding that warrantless searches of coal mines, which have a long history of pervasive government regulation, are constitutional). By contrast, there is no dispute in this case concerning the application of the Federal Mine Safety and Health Act to Nolichuckey's sand and gravel operations and the government has not, and could not, contend that Nolichuckey operates a coal mine or coal preparation facility.

this question does not depend upon a complicated factual inquiry, so that further litigation in the lower courts would serve no useful purpose.[12] At the same time, further litigation with respect to the question presented here undoubtedly will occur in the lower courts unless this Court intervenes, leading to disparate and irreconcilable results—and making application of the warrant requirement of the Fourth Amendment turn on an accident of geography.

[12] In opposing certiorari in *Stoudt's Ferry*, the government suggested that this Court should ignore the conflict among the lower courts because the decisions disapproving the warrantless inspection of sand and gravel facilities were in response to motions by the Secretary for a preliminary injunction and "were thus only provisional." Brief in Opposition, p. 9. In fact, the government's consistent strategy has been to submit the constitutional issue presented in these cases on a stipulated record, so as to permit the court to rule decisively on that issue at the preliminary injunction stage of the litigation. As a consequence, the conflict among the lower courts on the important constitutional issue presented here is "provisional" in only the most narrow and technical sense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-1111

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

NOLICHUCKEY SAND COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee

Decided and Filed October 5, 1979

Before: EDWARDS, Chief Judge, CELEBREZZE and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. The question for decision in this case: May an inspector of the Mine Safety & Health Administration enter the premises of a sand and gravel operation to make a routine inspection without a search warrant? The district court held that no warrant was required and enjoined the defendant from refusing to permit inspection of its premises by authorized representatives of the plaintiff.

The case was submitted to the district court on a stipulation and the testimony of a single witness—the supervisor of the inspector who was refused entry by the defendant. This witness was called by the defendant. The plaintiff offered no evidence, relying on the terms of a statute, the Federal Mine Safety and Health Amendments Act of 1977 [1]

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[1] Pub. L. 95-164, 91 Stat. 1290, to be codified as 30 U.S.C. § 801 et seq.

(the Act or the 1977 Amendments Act) and its legislative history.

There is no description or picture of the sand and gravel operation of the defendant in the record. It appears, however, that it is a typical rock quarry or gravel pit where work is done on the surface of the land, with no underground tunnels or shafts. Nevertheless, the parties stipulated that the operation of the defendant is subject to the Act, which refers to "coal or other mine." Included in the definition of "coal or other mine" is "an area of land from which minerals are extracted in non-liquid form . . . ." 30 U.S.C.A. § 802(h)(1)(A) (1979 pocket part). The issue, then, is whether the provisions of the Act which permit warrantless routine inspections of such "mines" offend the Fourth Amendment to the Constitution.

Since the decision of the Supreme Court in *See* v. *Seattle,* 387 U.S. 541 (1967), it has been settled that the Fourth Amendment warrant requirement does apply generally to code-enforcement inspections of commercial structures. However, the Supreme Court has subsequently identified two exceptions to the general requirement of a warrant. In *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970), the Court held that an establishment licensed to sell liquor could be searched by an inspector without a warrant. Noting the long history of government regulation of the liquor industry, the Court held that Congress has broad authority to determine standards of reasonableness for searches and seizures related to enforcement of such regulations. The Court later held that a treasury agent may make a warrantless search of premises of a licensed gun dealer. *United States* v. *Biswell,* 406 U.S. 311 (1972). While regulation of firearms does not have the long history applicable to the liquor industry, the Court found that close scrutiny of interstate traffic of firearms "is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." 406 U.S. at 315.

The two exceptions identified by the Court relate to particular industries—those with a long history of close regulation and those which are currently regulated in order to discharge an overriding responsibility of government. In the case of both exceptions the key element appears to have been the reasonableness of the congressional determination that warrantless searches or inspections should be permitted. "It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment." *Biswell, supra,* 406 U.S. at 316. This would appear to be the proper test, since the Fourth Amendment prohibits only those searches which are unreasonable.

The Supreme Court made it clear in *Marshall* v. *Bartlow's, Inc.,* [sic] 436 U.S. 307 (1978), that the warrant requirement applies except where Congress has responded to "relatively unique circumstances" in providing otherwise. 436 U.S. at 313. One who embarks upon an enterprise in an industry which has a history of close regulation, supervision and inspection has no reasonable expectation of privacy which would preclude warrantless inspections. "The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Id.,* quoting from *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 271 (1973).

The appellant argues that its business does not fall within an exception to the warrant requirement because the sand and gravel industry has no long history of government regulation, no license is required and it has never been "pervasively" regulated. Thus, the appellant contends, it was unreasonable for Congress to provide for warrantless inspections of its operations.

The sand and gravel industry first came under federal regulation with passage of the Federal Metal and Nonmetallic Mine Safety Act [2] (the Metal Act or the 1966 Act)

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[2] Pub. L. 89-577, 80 Stat. 772, 30 U.S.C. § 721 et seq. (1976).

in 1966. The 1966 Act was repealed and a number of its provisions were included in the 1977 amendments to the Federal Coal Mine Health and Safety Act of 1969. One of the amendments changed the definition of the word "mine" to include other mines as well as coal mines. The effect of the 1977 amendments was to bring other mineral extraction industries under the regulatory framework originally made applicable only to coal mining. At least with respect to health and safety measures all mining is now pervasively regulated. This is clear from the face of the 1977 Amendments Act and from its legislative history. See also, 30 C.F.R., Chapter 1.

The 1977 Amendments Act repeats the congressional findings and declaration of purpose found in the 1969 Coal Mine Act, adding "or other" where that Act referred only to coal mining:

> Congress declares that—
>
> (a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;
>
> (b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
>
> (c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;
>
> (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

> (e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines; [and]
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce.
>
> • • •
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> 30 U.S.C.A. § 801 (1979 pocket part).

These findings echo the historical statement of long recognition by Congress of "the hazards involved in mining coal and other minerals" and efforts to reduce these hazards beginning with the establishment of the Bureau of Mines in the Department of Interior in 1910. See S. Rep. No. 95-181, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. and Adm. News, p. 3401. Congress concluded from its study of statistics concerning fatal and disabling injuries in coal and other mines that new legislation was required. Specifically, it determined that "the Metal Act does not provide effective protection for miners from health and safety hazards and enforcement sanctions under that Act are insufficient to encourage compliance by operators." *Id.* at 3408.

The sand and gravel industry does not have the long history of regulation referred to in *Colonnade* or the extensive licensing scheme which was present in both *Colonnade* and *Biswell*. Nevertheless, as Congress found, all miners are exposed to unusually severe health and safety hazards. We believe it was reasonable to bring all mineral extraction businesses and operations under a single regulatory act. This is especially true for sand and gravel operations in light of statistics before Congress in 1966 which "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries." S. Rep. No. 1296, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. and Adm. News, p. 2851.

Section 201 of the 1977 Amendments Act[3] requires frequent inspections of coal or other mines, with a minimum of four complete inspections of each underground coal mine and two inspections of each surface coal or other mine each year. The purposes of these inspections by representatives of the Secretary of Labor are to determine whether an imminent danger exists and whether there is compliance with mandatory health or safety standards and with any citation or order previously issued. The statute directs that no advance notice of an inspection for these purposes shall be provided to anyone. Though there is no reference to search warrants in the language of the Act, the Senate Report states, "This is intended to be an absolute right of entry without need to obtain a warrant." 1977 U.S. Code Cong. and Adm. News, p. 3427.

In *Barlow's, supra,* the Supreme Court invalidated a provision for warrantless inspections contained in the Occupational Safety and Health Act of 1970 (OSHA). Such inspections were not limited to a single industry or occupation; they covered every business and industry affecting interstate commerce. Approval of warrantless inspections in such an "across the board" manner would have eviscerated the holding in *See* v. *Seattle* and would have turned the exception into the rule. However, we find nothing in *Barlow's* which requires a holding that only licensed businesses such as dealers in liquor and guns may be excepted from the requirement of a warrant. On the contrary, Justice White made it clear that requiring a warrant for OSHA inspection does not doom warrantless search provisions in other regulatory statutes. "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute." 436 U.S. at 321. The enforcement provisions of the Metal Act,[4] carried over to and included in the 1977 Amendments Act,[5] were

[3] 30 U.S.C.A. § 813 (1979 pocket part).

[4] 30 U.S.C. § 733(a) (1976).

[5] 30 U.S.C.A. § 818 (1979 pocket part).

cited as an example of procedures for judicial resolution of a dispute when entry is refused. *Id.,* at 321-22 n.18.

We conclude that the enforcement needs in the mining industry make a provision for warrantless inspections reasonable. The Act also contains privacy guarantees which are sufficient. As construed by this Court, Section 201(a) and (b)[6] of the Act permits warrantless inspections only of the "active workings" of coal mines. A warrant is required for the inspection of offices and other areas where the operator has a general expectation of privacy. See *United States* v. *Consolidation Coal Co.,* 560 F.2d 214, 217 (6th Cir. 1977), *vacated and remanded,* 436 U.S. 942 (1978), *judgment reinstated,* 579 F.2d 1011 (1978). The same limitation would apply to sand and gravel "mines." Further, the statute provides for participation in all inspections by a representative of the operator.[7] Finally, refusal of an operator to permit an inspection does not lead to summary imposition of sanctions. The Act provides for institution of a civil action by the Secretary of Labor seeking an injunction or other appropriate order.[8]

In concluding that a warrant is not required for periodic inspection of the "active workings" of sand and gravel "mines," we have considered several district court decisions which have reached the opposite conclusion. *E.g., Marshall* v. *Douglas, etc. Lime & Stone Co.,* —— F.Supp. —— (E.D. Wis., No. 79-C-114, 1979); *Valley Transit Mix, Inc.* v. *Marshall,* —— F.Supp. —— (D. N.M. No. 79-391-B, 1979), *Marshall* v. *Halquist Stone Co.,* —— F.Supp. —— (E.D. Wis., No. 78-C-463, 1978). We believe the decision of the Third Circuit in *Marshall* v. *Stoudt's Ferry Preparation Co.,* —— F.2d —— (No. 78-2364, decided July 1979), is better reasoned.

The judgment of the district court is affirmed.

[6] 30 U.S.C.A. § 813(a) and (b) (1979 pocket part).

[7] 30 U.S.C.A. § 813(f) (1979 pocket part).

[8] 30 U.S.C.A. § 818 (1979 pocket part).

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

No. CIV-2-78-108

RAY MARSHALL, etc., *Plaintiff*,

v.

NOLICHUCKEY SAND COMPANY, INC., *Defendant*.

MEMORANDUM OPINION

Mr. Charles E. McDaniel, an authorized representative of the plaintiff and employed as a federal mine safety and health inspector with the Mine Safety and Health Administration, went to the defendant's sand and gravel pit,[1] located within this district, on April 11, 1978 for the purpose of making a periodic safety and health inspection of such premises pursuant to the provisions of 30 U.S.C. § 813 (a).[2] Mr. McDaniel spoke with Messrs. Hazen and

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[1] The parties stipulated that the defendant's sand and gravel pit is subject to the provisions of the Federal Mine Safety and Health Act of 1977, *infra*. Thus, for present purposes this business is deemed to be a "mine" within the meaning of that Act.

[2] "• • • Authorized representatives of the Secretary [of Labor] • • • shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. • • • For the purpose of making any inspection or investigation under this chapter, • • • the Secretary [of Labor], with respect to ful-

Thomas Bewley, the president and vice president, respectively, of the defendant corporation. The latter Mr. Bewley refused to permit Mr. McDaniel to make such inspection. Mr. McDaniel left the premises, returned the following day, and was not permitted again to make his intended inspection. Each such refusal was based solely on the failure of Mr. McDaniel to present a search warrant authorizing the same. The sole purpose of the plaintiff's attempted inspection of the defendant's business premises was to check routinely for possible violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Mr. McDaniel had no knowledge of any specific violation thereof.

The plaintiff filed this action seeking a preliminary and permanent injunction to prohibit the defendant and its agents and employees from refusing his authorized representatives admittance to its mine, from refusing them permission to inspect the same, and from interfering with, hindering or delaying them in carrying out the provisions of the aforementioned Act. The Court's jurisdiction was invoked under the provisions of 30 U.S.C. § 818 (a) (1),[3] and

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filling his responsibilities under this Act, or any authorized representatives of the Secretary * * * shall have a right of entry to, upon or through any coal or other mine. * * * " 30 U.S.C. § 813(a).

[3] " * * * The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

(A) violates or fails or refuses to comply with any order or decision issued under this Act,

(B) interferes with, hinders, or delays the Secretary or his authorized representative * * * in carrying out the provisions of this chapter,

(C) refuses to admit such representatives to the coal or other mines,

(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine,

is not disputed. Trial of this action on the merits was advanced and consolidated with the hearing of the plaintiff's application for a preliminary injunction. See memorandum opinion and order herein of September 14, 1978.

The defendant claims that the plaintiff's representatives have no right to enter upon its premises for inspection purposes without a warrant authorizing the same. Specifically, it is contended that the provisions of 30 U.S.C. § 813 (a), which allow for warrantless inspections of mines,[4] and upon

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(E) refuses to furnish any information or report requested by the Secretary * * * in furtherance of the provisions of this chapter, or

(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. * * * " 30 U. S. C. § 818(a)(1).

[4] Although this statute does not say on its face, that its provisions are operative without a search warrant, the legislative history clearly shows that the Congress contemplated warrantless inspections. The Senate Report states that 30 U.S.C. § 818(a)(1):

" * * * authorizes the Secretary of Labor * * * to enter upon, or through any mine for the purpose of making any inspection or investigation under this Act. This is intended to be an absolute right of entry without need to obtain a warrant. The Committee notes with approval the decision of the three-judge Federal Court in *Youghiogheny & Ohio Coal Company* v. *Morton*, 364 F. Supp. 45 (S. D. Ohio 1973) which holds the parallel provision of the Coal Act permitting unannounced warrantless inspection of coal mines constitutional. Safety conditions in the mining industry have been pervasively regulated by Federal and State law. The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant. This intention is based upon the determination by legislation. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many

which the plaintiff relies, are violative of the Constitution, Fourth Amendment.[5] In support of this argument, the defendant relies primarily on the decision of the Supreme Court in *Marshall* v. *Barlow's, Inc.* (1978), —— U.S. ——, 98 S. Ct. 1816, 56 L. Ed. (2d) 305. It was held therein that 29 U.S.C. § 657(a), which empowers representatives of the Secretary of Labor to search the work area of any employment facility within the jurisdiction of the Occupational Safety and Health Act of 1970 (OSHA), in order to inspect for safety hazards and regulatory violations, violates the Constitution, Fourth Amendment, in so far as it purports to authorize such inspections without a warrant.

In *Barlow's, supra,* the Supreme Court recognized, however, that "* * * [c]ertain industries have such a history of government oversight that no reasonable expectation of privacy * * * could exist. * * *" *Ibid.,* —— U.S. at ——, 56 L. Ed. (2d) at 312 [3]. Thus, there is a well-established exception to the search warrant requirements of the Constitution, Fourth Amendment, "* * * for 'pervasively regulated business[es]' * * * and for 'closely regulated' industries 'long subject to close supervision and inspection.' * * *" *Idem.,* quoting from *United States* v. *Biswell* (1972), 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. (2d) 87, 92-93 and *Colonnade Catering Corp.* v. *United States* (1970), 397

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safety or health hazards may be concerned if advance warning of inspections is obtained. a warrant requirement would seriously undercut this Act's objectives.

"The Committee has specifically adopted the prohibition or advance notice of inspections which is currently the rule under the Coal Act, and rejects the provision of the Metal Act which permits such advance notice. * * * "

3 U. S. Code Cong. & Admin. News (1977), p. 3427.

[5] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches * * *, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation. * * * " Constitution, Fourth Amendment.

U.S. 72, 74, 77, 90 S. Ct. 774, 25 L. Ed. (2d) 60, 63, 65. The rationale of the *Biswell-Colonnade* rule is "* * * that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context. * * *" *G. M. Leasing Corp.* v. *United States* (1977), 429 U.S. 338, 353, 97 S.Ct. 619, 50 L. Ed. (2d) 530, 544. Thus, in regulating these particular industries, the Congress has broad authority to fashion standards of reasonableness for the purposes of Fourth Amendment searches. *Ibid.,* 429 U.S. at 353, 50 L. Ed. (2d) at 544 [9].

The liquor and firearms businesses are illustrative; they represent responses to relatively unique circumstances, so that "* * * when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full threat of close government regulation. * * *" *Marshall* v. *Barlow's, Inc., supra.* The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government regulation, of which any person who chooses to enter such a business must already be aware. *Idem.*

The plaintiff contends that the mining industry is also such a closely regulated industry as to fall within the *Biswell-Colonnade* exception to the Fourth Amendment's warrant requirement. The Congress appears to have agreed as is reflected in the legislative history of the instant statute: "* * * Safety conditions in the mining industry have been pervasively regulated by Federal and State law. * * *" 3 U.S. Code Cong. & Admin. News (1977), pg. 3427. As to the coal mining industry, it has been determined in this circuit that such industry "* * * has a history of close federal regulation under the aegis of the Commerce Clause. * * *" *United States* v. *Consolidated Coal Co.,* C. A. 6th (1977), 560 F. (2d) 214, 220 [5], *vacated and remanded* (1978), —— U.S. ——, —— S. Ct. ——, 56 L. Ed. (2d) 783, judgment and opinion reinstated on remand (1978), 579 F.

(2d) 1011; *accord: Youghiogheny and Ohio Coal Company* v. *Morton, D. C. Ohio*[6] (1973), 364 F. Supp. 45, 49, esp. n. 3. The present Act, Public Law 94-164 of November 9, 1977, brought the operation of all coal and other types of mines under a single legislative canopy. It essentially combined the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. § 801, et seq., with the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721, *et seq.*

The warrantless inspection provisions of 30 U.S.C. § 813 (a) come before this Court with a strong presumption in favor of their constitutionality. *Lockport* v. *Citizens For Community Action* (1977), 430 U.S. 259, 272, 97 S. Ct. 1047, 51 L. Ed. (2d) 313, 325 [12]; *Marshall* v. *Barlow's, Inc.* (1977), 429 U.S. 1347, 1348, 97 S. Ct. 776, 50 L. Ed. (2d) 739, 740 [2] (Rehnquist, J., as circuit justice). This presumption continues until the statute's unconstitutionality is shown beyond a rational doubt, *F.H.A.* v. *The Darlington* (1958), 358 U.S. 84, 90-91, 79 S. Ct. 141, 3 L. Ed. (2d) 132, 137 (headnote 6), rehearing denied (1959), 358 U.S. 937, 79 S. Ct. 310, 3 L. Ed. (2d) 311; and its provisions must be upheld, unless it is shown clearly to be incompatible with the Constitution, *New York* v. *O'Neill* (1959), 359 U.S. 1, 6, 79 S. Ct. 564, 3 L. Ed. 585, 589 (headnote 4). That presumption of constitutionality is especially compelling where, as here, the validity of an act of the Congress turns on what is a reasonable search under the Constitution, Fourth Amendment, and "* * * '[o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional.' * * *" *United States* v. *Watson* (1976), 423 U.S. 411, 416, 96 S. Ct. 820, 46 L. Ed. (2d) 598, 605 [2], quoting from *United States* v. *Di Re* (1948), 332 U.S. 581, 585, 68 S. Ct. 222, 92 L. Ed. 210.

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[6] This was a District Court of three judges comprised by Circuit Judge Peck and District Judges Kinneary and Rubin.

Although not wholly free of doubt, in the opinion of this Court, the provisions of 30 U.S.C. § 813 (a), *supra,* fall within the *Biswell-Colonnade* exception to the warrant requirement of the Constitution, Fourth Amendment. *Barlow's, supra,* is readily distinguishable from the instant situation: there, the invalidated OSHA statute encompassed virtually every type of industry regardless of the extent of that industry's history of regulation by the federal government; here, we are dealing with a statute relating to a single industry (mining), which industry has had a history of close federal supervision and regulation.[7] Thus, considering the specific enforcement needs and privacy guarantees of 30 U.S.C. § 813(a), *Marshall* v. *Barlow's, Inc., supra,* —— U.S. at ——, 56 L. Ed. (2d) at 317 [7], the plaintiff's attempt to "* * * search * * *" the defendant's premises on this occasion was reasonable. The language of Mr. Justice White, writing for the Supreme Court, is particularly appropriate in the present context:

* * *

> * * * [I]f the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. * * * Here, if inspection is to be effective and serve as a credible deterrent, unan-

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[7] This distinguishing factor was recognized by the Supreme Court in *Barlow's, supra*:

> "* * * 'A central difference between those cases [Colonnade and Biswell] and this one [Barlow's] is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.' * * *"

Marshall v. *Barlow's Inc., supra,* —— U. S. at ——, 56 L. Ed. (2d) at 312, quoting from *Almeida-Sanchez* v. *United States* (1973), 413 U. S. 266, 271, 93 S. Ct. 2535, 37 L. Ed. (2d) 596.

nounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible. * * * [W]here, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute. * * *

* * *

United States v. *Biswell, supra,* 406 U.S. at 316, 317, 32 L. Ed. (2d) at 92, 93.

Accordingly, the defendant Nolichuckey Sand Company, Inc., its officers, agents and employees, hereby are ENJOINED permanently from:

—refusing authorized representatives of the plaintiff admittance to its mining premises,

—refusing such representatives permission to inspect such premises, and

—hindering or delaying such representatives in conducting periodic safety and health inspections of its premises under the provisions of 30 U.S.C. § 813 (a).[8] 30 U.S.C. § 818 (a) (1). Judgment to that effect will enter, Rule 58 (1), Federal Rules of Civil Procedure, and the above injunction will issue and be served on the defendant.

FILE:

/s/ C. G. NEESE
C. G. Neese
United States District Judge

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[8] Such determination of this action on the merits renders moot the motion herein of the defendant for a preliminary injunction.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHEASTERN DIVISION

[Caption Omitted in Printing]

JUDGMENT

This action came on for consideration before the Court, Honorable C. G. Neese, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the defendant Nolichuckey Sand Company, Inc., its officers, agents and employees, hereby are ENJOINED permanently from:

—refusing authorized representatives of the plaintiff admittance to its mining premises,

—refusing such representatives permission to inspect such premises, and

—hindering or delaying such representatives in conducting periodic safety and health inspections of its premises under the provisions of 30 U.S.C. § 813 (a). 30 U.S.C. § 818 (a) (1).

Dated at Greeneville, Tennessee, this fourteenth day of December, 1978.

/s/ KARL D. SAULPAW, JR.
Clerk of Court

/s/ DIXIE J. BLAKE
Deputy Clerk

APPENDIX C

Stipulation

1. Charles E. McDaniel is an authorized representative of the Secretary of Labor, employed as a Federal Mine Safety and Health Inspector with the Mine Safety and Health Administration assigned to the subdistrict office, Knoxville, Tennessee. In that capacity he conducts inspections of mines pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977.

2. On April 11, 1978, Mr. McDaniel went to the Nolichuckey Sand Company, Inc., to perform a safety and health inspection. He spoke with the president of the company, Hazen Bewley, about the Mine Safety and Health Act of 1977.

3. Thomas Bewley, vice president of the defendant joined the conversation asking questions concerning the Act and the authority for conducting inspections under the Act.

4. Thomas Bewley refused to permit an inspection of the property. Mr. McDaniel suggested that Mr. Bewley consult with his attorney before refusing to permit the inspection. Mr. Bewley called the attorney by telephone.

5. After his telephone conversation, Mr. Bewley informed Mr. McDaniel that his attorney had advised him to refuse to permit the performance of an inspection without a search warrant and that the attorney would call back shortly to discuss similar cases involving the Occupational Safety and Health Act.

6. Mr. McDaniel left the property after giving Thomas Bewley a copy of the Act.

7. Mr. McDaniel returned to the property on April 12, 1978, to determine whether Mr. Bewley had changed his mind about permitting an inspection of the premises. Mr. Bewley asked whether Mr. McDaniel had a search warrant.

Mr. McDaniel did not have a search warrant. Mr. Bewley then called his attorney.

8. Following the telephone conversation with his attorney, Mr. Bewley said that his attorney had told him to require that Mr. McDaniel obtain a search warrant if he wished to inspect the property. No inspection was permitted.

9. The defendant operates a sand and gravel pit subject to the Act in or near Greeneville, Greene County, Tennessee, within the jurisdiction of this Court.

10. The initial and all subsequent refusals to allow the inspection by Mr. McDaniel were based solely on the absence of a search warrant.

/s/ FREDERICK W. MONCRIEF

/s/ C. B. BELL

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ No. 79-391-B
Consolidated with Nos. 79-393, 79-422 & 79-454

VALLEY TRANSIT MIX, INC. and VALLEY TRANSIT MIX, INC.
d/b/a
ATLAS LAND COMPANY, INC., New Mexico Corporations,
Plaintiffs,

vs.

RAY F. MARSHALL, Secretary, United States Department of Labor,
Defendant.

Civ No. 79-393

WALLACH CONCRETE PRODUCTS, INC.,
a New Mexico Corporation,
Plaintiff,

vs.

RAY F. MARSHALL, Secretary, United States Department of Labor,
Defendant.

Civ No. 79-422

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

WALLACH CONCRETE PRODUCTS COMPANY,
Defendant.

Civ No. 79-454

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff,

vs.

VALLEY TRANSIT MIX, INC., d/b/a
ATLAS LAND CO., INC.,

Defendant.

MEMORANDUM OPINION

This action is a consolidation of four separate lawsuits arising out of two attempted warrantless inspections by Federal Mine Safety and Health Administration inspectors pursuant to the Mine Safety and Health Act (MSH).[1] In both instances the company refused to allow the inspector to inspect the sand and gravel operation. In cause 79-391-B Valley Transit Mix, Inc. and Atlas Land Company, Inc. (Valley) seeks to declare the warrantless search provisions of MSH unconstitutional and enjoin the inspectors from conducting further warrantless inspection of its sand and gravel operation. In Cause 79-454-B, Ray Marshall, the Secretary of Labor (Secretary) asks the Court to enjoin Valley from refusing to admit an inspector or from interfering with his inspection. Causes 79-393-B and 79-422-B are similarly related. In 79-393-B Wallach Concrete Products, Inc. (Wallach) seeks an order declaring the warrantless inspections unconstitutional and to enjoin any further warrantless inspections under MSH. In 79-422-B the Secretary seeks to enjoin Wallach from refusing to admit his representative or from interfering with any inspections conducted under the Act. All parties seek a preliminary injunction. The matter was set down for hearing and the Court having heard the parties and considered the memoranda on file, together with the entire file herein concludes for the reasons set forth below that none of the applications for

[1] 30 U.S.C. § 801 *et seq.*

preliminary injunction is well taken at this time and the applications should be denied.

The standard for determining whether a preliminary injunction should be issued is well defined.[2] There are four factors to be considered:

1. A likelihood that the movant will prevail on the merits.
2. Irreparable injury to the movant if the relief is not granted.
3. No harm to the public interest if the application is granted.
4. The threatened injury to movant outweighs the injury the injunction may cause the defendant.

The Court will first consider the Secretary's application. Generally statutes allowing warrantless administrative inspections are invalid. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Camera* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967). There are, however, some exceptions to this general rule. *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). In *Barlow's* the Supreme Court carefully considered the exceptions and determined that warrantless searches were valid only in "relatively unique circumstances." The Court reaffirmed the principal that warrantless searches may be justified in businesses that are subject to close supervision or pervasive governmental regulations. The Court stated that, "when an entrepreneur embarks upon such a business, [one that is pervasively regulated] he has voluntarily chosen to subject himself to a full arsenal of governmental regulations." *Barlow's, supra* at 313.

[2] *Fox Valley Harvestore, Inc.* v. *A. O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976); *Associated Securities Corp.* v. *SEC*, 283 F.2d 773 (10th Cir. 1960).

In the present actions the Secretary argues that mines are pervasively regulated and therefore fall within the *Biswell-Colonnade* exception. The companies disagree claiming the warrantless inspections of their sand and gravel pits are similar to the warrantless inspections under OSHA which were declared unconstitutional in *Barlow's*. The Secretary has not carried his burden of showing a likelihood of success on the merits. At this time the Court is not convinced that the sand and gravel business is subject to the kind of pervasive regulation that would allow warrantless inspections. Unlike the liquor (*Colonnade*) and the firearm (*Biswell*) industries the sand and gravel industry does not "have a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, supra* at 313.

The Secretary argues that *Youghiogheny and Ohio Coal Co.* v. *Morton,* 364 F.Supp. 45 (S.D. Ohio 1973) is controlling. In that case the court allowed the warrantless inspection of an underground coal mine. The court ruled that the inherently dangerous working condition warranted the pervasive regulations and hence the warrantless inspections. This Court finds *Youghiogheny* unpersuasive for two reasons. First, it was decided prior to *Barlow's* and must be reexamined in light of *Barlow's*. Second, and most significantly, it dealt with the warrantless inspection of an underground coal mine and not open pit sand and gravel operations. The present record is devoid of any indication of more inherent danger to workers in an open sand and gravel pit than to workers in any other heavy construction operation. Therefore, the Secretary's application for a preliminary injunction will be denied.

Turning to the companies' application, the Court, in light of the Secretary's policy of not attempting additional warrantless inspections prior to the termination of the judicial proceeding unless there is an accident or other unusual

occurrence, concludes that the companies have not shown they will suffer any irreparable injury if their application is not granted. Therefore, the companies' applications will be denied.

The matter will be set down for a hearing on the merits. A separate order will be entered in accordance with this Opinion.

/s/ HOWARD C. BRATTON
Howard C. Bratton
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, Secretary of Labor, United States Department of Labor, *Plaintiff*,

vs.

DOUGLAS DEWEY and WAUKESHA LIME & STONE Co., Waukesha, Wisconsin, *Defendants*.

MEMORANDUM AND ORDER

This is a simple case, factually. The government, through one Walter C. Brey, wishes to inspect defendant's quarry pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960. To illustrate the dangers of a quarry, the government points to the death of Douglas J. Bartell, who "was killed on September 16, 1975 when he was buried in a mixture of gravel and limestone" at defendant's site. (Brey Affidavit).

Mr. Brey inspected defendant's location on September 17, 1975 and issued two notices of violations of safety standards. On April 25, 26 and 27 of 1978, Mr. Brey conducted a follow-up safety and health inspection at which time 25 citations were issued for violations of mandatory health and safety standards. Then, on July 10, 1978, Mr. Brey returned to make another inspection in order to determine whether defendant had corrected one problem, namely the exposure to silica-bearing dust by an employee bagging lime. Defendant refused to permit Mr. Brey to conduct a search and demanded he obtain a valid search warrant prior to inspection.

The government in this action is seeking a preliminary injunction enjoining defendant from refusing to permit

inspection of its mines. The sole issue presented by this action is whether the Federal Mine Safety and Health Act, as applied to quarries, permits the government through the Secretary of Labor to conduct warrantless searches.

In order to grant a preliminary injunction, four prerequisites must be met: (1) plaintiff must show that he has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) that the plaintiff has a reasonable likelihood of success on the merits; (3) that in granting the preliminary injunction, the Court will not disserve the public interest; and (4) that any threatened injury to the plaintiff outweighs the injury the injunction may cause the defendant. *Fox Valley Harvestore, Inc.* v. *A. O. Smith Harvestore Products,* 545 F.2d 1096 (7th Cir. 1976). Furthermore, plaintiff has the burden of persuasion on all of these prerequisites. *Id.*

Although all four elements must be overcome before a preliminary injunction will issue, in this case particular emphasis must be placed upon the second element, namely plaintiff's likelihood of success on the merits. The key decision bearing on this case is the Supreme Court's holding in *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978) wherein the Court held that the Occupational Health and Safety Act (OSHA) did not permit the government to conduct warrantless searches.

In ruling on the issue presented in *Barlow's,* the Supreme Court held that there are exceptions to the search warrant requirements, *e.g.,* those businesses subject to close supervision or regulation. *United States* v. *Biswell,* 406 U.S. 311, 316 (1972) and *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 74, 77 (1970). In discussing why warrantless searches are permitted in certain industries (*e.g.,* liquor and firearms) the Court stated "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall* v. *Barlow's, Inc.,* 436 U.S. at 313. In further

elucidating the limited class of searches in which a warrant in not required the Court held "The element that distinquishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.*

The only conclusion that can be drawn from reading the Court's decision in *Marshall* v. *Barlow's, Inc., supra,* is that warrantless searches are only permissible in extremely narrow circumstances. In reviewing the facts of the present case, this Court is drawn to the conclusion that the Federal Mine Safety and Health Act of 1977, as applied to quarries, does not permit the Secretary of Labor to conduct warrantless searches.

First, the Federal Coal Mine Health and Safety Act of 1969 was only amended to cover mines other than coal mines in 1977 by Public Law 95-164. The Act as applied to other mines did not even become effective until March 9, 1978. Therefore, the long continuous regulation mentioned by the Supreme Court is absent. Secondly, the Secretary does not describe any unusual circumstances in the quarry type of businesses to necessitate a warrantless search.

Plaintiff cites *Youghiogheny and Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45 (S.D. Ohio 1973) for the proposition that warrantless searches in mines are permissible. First, that case dealt with underground coal mines rather than quarries; second, that case was decided prior to *Marshall* v. *Barlow's, Inc., supra,* and thus that case must be placed in the balance. With these distinctions in mind, the Court does not find that a warrantless search is justified in this case, even assuming that *Youghiogheny* is correct.

Therefore, since the Secretary of Labor has failed to show a reasonable likelihood of success on the merits, his motion for a preliminary injunction must be and hereby is denied.

Defendants have requested the Court, however, to issue a preliminary injunction in its favor. Defendants express the fear that the government will try further warrantless searches and then issue citations to defendants for their refusal. Defendants' request must be denied at this time. The government has represented to the Court that it will not pursue any warrantless searches. If the government does attempt to conduct searches and issue citations, the Court stands ready to reconsider defendants' request. At this time, the irreparable harm element is absent.

Therefore, plaintiff's petition for a preliminary injunction must be and hereby is denied. Furthermore, defendants' request for a preliminary injunction is also denied.

So Ordered this 29th day of March, 1979, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
Robert W. Warren
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

Ray Marshall Secretary of Labor, United States Department of Labor, *Plaintiff*,

vs.

Douglas Dewey and Waukesha Lime & Stone Co., Waukesha, Wisconsin, *Defendants.*

MEMORANDUM AND ORDER

On March 9, 1979, an oral hearing was held on plaintiff's motion for a preliminary injunction, and based upon oral argument and written briefs, the Court denied plaintiff's motion. The Court's opinion, which was read into the record on March 9, 1979, was put into written form and signed on March 29, 1979. Plaintiff has moved for reconsideration, claiming that the Court erred when it held that quarries were not pervasively regulated industries.

In the present case, plaintiff seeks to enjoin defendant from refusing to permit plaintiff to conduct inspections without warrants. Of course warrantless searches are ordinarily impermissible. However, the Supreme Court has recognized that in certain limited circumstances, warrantless searches are permitted. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). In *Barlow's*, the Supreme Court articulated why warrantless searches are permissible in certain industries (*e.g.*, liquor and firearms) by stating "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." The Court further stated "the element that distinguishes these enterprises from ordinary businesses is a long tradition of close government super-

vision, of which any person who chooses to enter such a business must already be aware." *Barlow's, Inc.*, 436 U.S. at 313. The question presented in the present case is whether the stone quarry industry is pervasively regulated.

The Court would note that the first federal statute regulating stone quarries was the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et seq.*, enacted by Congress in 1966. This legislation is discussed in S.Rep. No. 1296, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. Code Cong. & Ad. News 2846. In that report, it is pointed out that in 1961 Public Law 87-300 was passed authorizing the Secretary of the Interior to conduct a study of state mine safety laws and the health hazards of mines. Apparently this report, attached as an appendix to plaintiff's brief, formed the basis of the 1966 legislation. The Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et. seq.* was succeeded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* The latter act, specifically 30 U.S.C. § 813(a), permits warrantless inspections.

Regulation of stone quarries by the federal government, therefore, commenced in 1966. Prior to the federal laws, some of the several states regulated mines, but in a haphazard and ineffective manner. The federal legislation passed in 1966, as reflected by Senate Report 1296, was aimed at comprehensive regulation.

In this Court's opinion, the tradition of pervasive regulation of the stone quarry industry did not commence until 1966. The survey conducted pursuant to Public Law 87-300 shows loose and at times non-existent regulation of stone quarries prior to the federal regulation enacted in 1966. Several federal district courts have found that the mining industry, *i.e.*, gravel quarries and the like, is pervasively regulated such that warrantless inspections are permissible. *Marshall* v. *The Texoline Co.*, No. 4-78-49 (N.D. Texas, Mar. 23, 1979); *Marshall* v. *Nolichuckey Sand Co.*, No. 2-78-108 (E.D. Tenn. Dec. 14, 1978); *Marshall* v. *Elden Wait*, No.

S-78-11 (E.D. Cal. May 9, 1978); *Andrus* v. *Magma Copper Co.*, No. 77-765 (D. Ariz. Jan. 16, 1978). In an action brought before Chief Judge Reynolds of this district, he found that the plaintiff had not shown that the stone quarry industry was pervasively regulated and thus he denied plaintiff's motion for a preliminary injunction. *Marshall* v. *Halquist Stone Co.*, No. 78-C-463 (E.D. Wis. Sept. 15, 1978).

The Fourth Amendment to the United States Constitution means what it says. Notwithstanding the Supreme Court having noticed several exceptions to the warrant requirement, in this Court's opinion, the pervasive regulation of the type found in the liquor industry, *e.g.*, had not existed until Congress entered the field. Such late entry cannot meet the requirements set forth in *Barlow's, supra.*

Having reviewed the materials submitted by plaintiff, being aware of the flexible nature of the requirement that plaintiff must make a showing of "reasonable success on the merits," *Mullis* v. *Arco Petroleum*, 502 F.2d 290, 293 (7th Cir. 1974), and cognizant of "the presumption of constitutionality to which every duly enacted state and federal law is entitled . . .," *Lockport* v. *Citizens of Community Action*, 430 U.S. 259, 272 (1977), the Court, on reconsideration, must deny plaintiff's motion for a preliminary injunction. Plaintiff has not made the necessary showing under *Fox Valley Harvestore, Inc.*, v. *A. O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976).

So Ordered this 30th day of May, 1979, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
Robert W. Warren
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

C.A. No. 78-C-463

RAY MARSHALL, Secretary of Labor, United States Department of Labor, *Plaintiff*,

v.

HALQUIST STONE COMPANY, INC., t/a/d/b/a Halquist Stone Company, Inc., Lannon Quarry and Mill, *Defendants.*

DECISION AND ORDER

The United States Secretary of Labor has moved the court for a preliminary injunction pursuant to § 108 of the Federal Mine Safety and Health Act of 1977. The Secretary asserts that § 103(a) of the Act, granting the Secretary a right of entry into coal and other mines, including the stone quarry in this case, is constitutional. For the reason stated briefly below, without reaching the question of the constitutionality of the statute, this Court finds that the record established in this hearing is insufficient to allow the Court to grant the preliminary injunction.

On June 1, 1978, Albin Halquist, agent of the defendant Halquist Stone Company, refused to permit an authorized representative of the Secretary of Labor, Mr. Walter C. Brey, to inspect the Lannon Quarry and Mill in Lannon, Wisconsin. Mr. Halquist demanded that a search warrant be obtained prior to inspection. In defense of his refusal to allow the inspection, Mr. Halquist points to the recent decision in *Marshall* v. *Barlow's, Inc.*, 46 U.S.L.W. 4483 (May 23, 1978).

Marshall v. *Barlow's, Inc.*, has called the right-of-entry provisions in the federal statutes into question. The Court declared the Occupational Safety and Health Act of 1970 to

be unconstitutional insofar as it authorized inspection without a warrant. The Court, however, allowed for an exception to the warrant requirement in pervasively regulated industries.

The precise issue in this case is whether a stone quarry is a pervasively regulated industry and, thus, within the exception to the warrant requirement. In contending that it is, the plaintiff refers to the statement of the congressional purpose in the Act, 30 U.S.C. § 801, as "evidence of the fact" that Congress has made findings as to the degree of regulation that all of the industries covered by the Act are subject to. Such a declaration by Congress, standing alone, is not sufficient for this Court to find that a stone quarry is part of a "pervasively regulated" industry and that the Secretary is likely to prevail on the merits of this action.

IT IS THEREFORE ORDERED that the plaintiff's motion for a preliminary injunction is denied.

Dated at Milwaukee, Wisconsin, this 15th day of September, 1978.

/s/ JOHN W. REYNOLDS
John W. Reynolds,
Chief Judge